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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT TACOMA

9 CHRISTOPHER ANDREW BISTRYSKI,

10 Plaintiff,

11 v.

12 DEPARTMENT OF HEALTH
13 SERVICES OF STAFFORD CREEK
14 CORRECTIONS CENTER, et al.,

Defendants.

CASE NO. 3:17-cv-5369 RJB-TLF

REPORT AND
RECOMMENDATION

Noted for January 12, 2018

15 This is a civil rights action brought pursuant to 42 U.S.C. § 1983. Plaintiff is proceeding
16 with this action *pro se* and *in forma pauperis*. Plaintiff filed a motion for a temporary restraining
17 order and preliminary injunction on September 27, 2017. Dkt. 24. The undersigned recommends
18 that the Court deny the motion because it is moot as to all defendants except Advanced
19 Registered Nurse Practitioner (ARNP) Sheryl Allbert and Plaintiff's claim against ARNP Allbert
20 is unlikely to succeed.

21 BACKGROUND

22 Mr. Bistryski is incarcerated at the Monroe Correctional Complex-Special Offender Unit
23 (MCC-SOU). He sues multiple defendants including individuals Michael Furst, Scott Light,

1 Charles Casey, and Sheryl Allbert, along with DOC Health Services of Stafford Creek
2 Corrections Center, DOC Health Services of Monroe Corrections Center Special Offender
3 Center, and the Medical Care Review Committee. Plaintiff asks for damages and injunctive
4 relief, asserting that defendants have violated his right to adequate medical care under the Eighth
5 Amendment. Dkt. 6, at pp. 4, 6-14.

6 DISCUSSION

7 The basic function of preliminary injunctive relief is to preserve the status quo ante litem
8 pending a determination of the action on the merits. *Los Angeles Memorial Coliseum Comm'n v.*
9 *National Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980). The standards for issuing
10 temporary restraining orders are “substantially identical” to the standards for issuing preliminary
11 injunctions. *Stuhlbarg Intern. Sales Co., Inc. v. John D. Brushy & Co., Inc.*, 240 F.3d 832, 839
12 n.7 (9th Cir. 2001).

13 Parties seeking injunctive relief must show that they are likely to succeed on the merits,
14 that they are likely to suffer irreparable harm without preliminary relief, that the balance of
15 equities tips in their favor, and that an injunction is in the public interest. *Winter v. Natural Res.*
16 *Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The Ninth Circuit has set forth a “serious questions”
17 variation of this standard, under which “a preliminary injunction is proper if there are serious
18 questions going to the merits; there is a likelihood of irreparable injury to the plaintiff; the
19 balance of hardships tips sharply in favor of the plaintiff; and the injunction is in the public
20 interest.” *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012).

21 Under either framing, preliminary injunctive relief is “an extraordinary and drastic
22 remedy, one that should not be granted unless the movant, by a clear showing, carries the burden
23 of persuasion.” *Lopez*, 680 F.3d at 1072 (quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972

1 (1997) (per curiam)). To fulfill the “irreparable harm” requirement, the moving party “must do
2 more than merely allege imminent harm,” but “must demonstrate immediate threatened injury.”
3 *Associated Gen. Contractors of California, Inc. v. Coal. for Econ. Equity*, 950 F.2d 1401, 1410
4 (9th Cir. 1991).

5 **A. Plaintiff’s Request to Enjoin Defendant Furst and Institutional Defendants is Moot.**

6 In separate Reports and Recommendations, Dkt. 33, 34, the undersigned has found that
7 Plaintiff failed to state a claim against defendant Furst and against the institutional defendants.
8 Accordingly, Plaintiff’s motion for a temporary restraining order (TRO) and preliminary
9 injunction is moot as to those defendants.

10 **B. Plaintiff’s Request to Enjoin Defendants Light and Casey is Moot.**

11 Defendants Light and Casey work at Stafford Creek Corrections Center (SCCC). *See* Dkt.
12 6, pp. 6-7. Plaintiff was transferred to MCC-SOU in July 2015. *See* Dkt. 6, p. 8. There is no
13 indication from the record that Mr. Light or Lieutenant Casey have any ability to influence
14 Plaintiff’s present treatment. Plaintiff’s request that the Court order those defendants to provide
15 him with certain care is therefore moot. *See Nelson v. Heiss*, 271 F.3d 891, 897 (9th Cir. 2001)
16 (“[W]hen a prisoner is moved from a prison, his action will usually become moot as to
17 conditions at that particular facility. . . . We, therefore, agree that Nelson's action for injunctive
18 relief against the [officials at plaintiff’s former prison] has become moot.”).

19 **C. Plaintiff’s Claim against Defendant Allbert is Unlikely to Succeed on the Merits.**

20 To succeed on a claim under 42 U.S.C. § 1983, a plaintiff must show that (1) the conduct
21 the plaintiff complains of was committed by a person acting under the color of state law; and (2)
22 the conduct deprived the plaintiff of a federal constitutional or statutory right. *Gibson v. United*
23 *States*, 781 F.2d 1334, 1338 (9th Cir. 1986). To satisfy the second prong, a plaintiff must show

1 how individually named defendants caused, or personally participated in causing, the harm
2 alleged in the complaint. *See Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981). The plaintiff
3 must show that a specific injury resulted from the conduct of a particular defendant and that an
4 affirmative link exists between the injury and that defendant's conduct. *Rizzo v. Goode*, 423 U.S.
5 362, 371-72, 377 (1976).

6 Plaintiff asserts that defendants, including ARNP Allbert, deprived him of his Eight
7 Amendment right to adequate medical care. To succeed on an Eighth Amendment claim for
8 failure to provide medical treatment, a plaintiff must satisfy two elements.

9 First, the plaintiff must show a serious medical need, meaning the defendant's failure to
10 treat the plaintiff's condition could cause "further significant injury or the unnecessary and
11 wanton infliction of pain." *Lemire v. California Dept. of Corrections & Rehabilitation*, 726 F.3d
12 1062, 1081 (9th Cir. 2013).

13 Second, the plaintiff must show that the defendant's response to the need was deliberately
14 indifferent. *Lemire*, 726 F.3d at 1082. This requires (a) a purposeful act or failure to respond to
15 the plaintiff's pain or possible medical need, and (b) harm caused by the indifference. *Jett v.*
16 *Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006). The defendant must know of and disregard an
17 excessive risk to the plaintiff's health or safety. The defendant "must both be aware of facts from
18 which the inference could be drawn that a substantial risk of serious harm exists, and he must
19 also draw the inference." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Accordingly, mere
20 indifference, negligence, or medical malpractice will not support a deliberate indifference claim.
21 *Broughton v. Cutter Labs.*, 622 F.2d 458, 460 (9th Cir. 1980).

22 Here, Plaintiff alleges ongoing "neurological disturbances such as inability to focus,
23 mental fatigue, short-term memory loss, general mental foggiess, and strange speech and

1 cognition errors.” Dkt. 6, p. 5. These disturbances have allegedly caused him worsening
2 cognitive difficulties. Dkt. 6, p. 6. He began noticing these symptoms in September 2014. Dkt. 6,
3 p. 5. He informed staff at SCCC about them in June 2015. Dkt. 6, p. 7. The symptoms continued
4 until July 2015, when Plaintiff was transferred from SCCC to MCC-SOU. Dkt. 6, p. 9. They then
5 resumed in June 2016. Dkt. 6, p. 9. Plaintiff suspects that his symptoms are caused by
6 neurological illness and/or exposure to toxins. *Id.* Although Plaintiff requested IQ testing “or
7 more sensitive neurological examinations,” his providers declined, finding such measures
8 unnecessary. *See* Dkt. 29-1, p. 25.

9 ARNP Allbert is a medical provider at MCC-SOU. *See* Dkt. 6, p. 70. Plaintiff alleges that
10 ARNP Allbert is responsible for scheduling prisoners at MCC-SOU for outside appointments
11 when the prisoners require specialized treatment or evaluation. Dkt. 24, p. 10. ARNP Allbert met
12 with Plaintiff in July 2015, soon after he was transferred to MCC-SOU. Dkt. 6, p. 70. Plaintiff
13 told ARNP Allbert that he believed he had been exposed to a chemical compound,
14 Dichloromethane, and that it was causing his neurological problems. *Id.*

15 Plaintiff continued to see medical providers regularly regarding his complaints. ARNP
16 Allbert saw Plaintiff again in August 2016. Dkt. 29-1, p. 15. Plaintiff told ARNP Allbert that
17 someone was “messaging with his food” and he would not eat anything other than salad. *Id.* ARNP
18 Allbert discussed with him the likelihood that this was not real, and he acknowledged it could be
19 a psychiatric issue. ARNP Allbert assessed him as having paranoia. *Id.*

20 ARNP Allbert presented Plaintiff’s case to the Care Review Committee in March 2017.
21 Dkt. 29-1, p. 25. The Committee determined that Plaintiff’s request for a neurology consultation
22 did not meet the standard of medical necessity. *Id.*

1 Plaintiff has not shown that he is likely to prevail on an Eighth Amendment claim against
2 ARNP Allbert. As noted above, to demonstrate deliberate indifference Plaintiff must show that
3 the defendant knew of and disregarded an excessive risk to the plaintiff's health or safety.
4 *Farmer*, 511 U.S. at 837. And to obtain preliminary injunctive relief, Plaintiff must show
5 "immediate threatened injury." *Associated Gen. Contractors*, 950 F.2d at 1410. The record at
6 this stage contains neither showing.

7 Instead, the materials submitted by both Plaintiff and the defendants indicate that Plaintiff
8 has seen numerous health care providers who have tried to help him deal with his symptoms,
9 including offering testing for those symptoms and recommending that he resume taking bipolar
10 medications. *See, e.g.*, Dkt. 6, pp. 19, 23, 124, 131, 137; Dkt. 29-1, pp. 21, 24. The most recent
11 record, from August 2017, indicates that Marlinda Pruden, Ph.D., planned to "[p]repare neuro-
12 psychological testing battery based on [Plaintiff's] concerns." Dkt. 29-1, p. 34.

13 None those records indicate that any of Plaintiff's medical providers have recommended
14 a neurology consultation or found one to be necessary. The closest thing that Plaintiff points to is
15 Dr. Ashirova's notes that Plaintiff's scores on cognitive testing declined between 2006 and 2016.
16 Dkt. 6, p. 130-31. Dr. Ashirova recommended further assessments "to identify the nature of this
17 decline." Dkt. 6, p. 131.

18 But Dr. Ashirova found that Plaintiff's belief about the nature of the decline indicated
19 delusional thinking. *Id.* He diagnosed Plaintiff primarily with bipolar disorder and made
20 secondary diagnoses of posttraumatic stress disorder, social anxiety disorder, and alcohol use
21 disorder. *Id.* He made a provisional diagnosis of unspecified neurocognitive disorder. *Id.* Nothing
22 in Dr. Ashirova's notes implies that Plaintiff's possible neurological condition constituted an
23 "immediate threatened injury."

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2 Thus, the record before the Court indicates that Plaintiff is unlikely to succeed in proving
3 that ARNP Allbert drew an inference that an excessive risk of serious harm existed and failed to
4 act on it. *See Farmer*, 511 U.S. at 837; *Winter*, 555 U.S. at 20. Likewise, this record does not
5 show an “immediate threatened injury” warranting preliminary injunctive relief. *See Associated*
6 *Gen. Contractors*, 950 F.2d at 1410.

7 CONCLUSION

8 Based on the foregoing discussion, the undersigned recommends that the Court find that
9 Plaintiff has not met the standard to obtain a temporary restraining order or a preliminary
10 injunction as to any defendant, and therefore that the Court **DENY** Plaintiff’s motion for a
11 temporary restraining order and preliminary injunction.

12 The parties have **fourteen (14) days** from service of this Report and Recommendation to
13 file written objections thereto. 28 U.S.C. § 636(b)(1); FRCP 72(b); *see also* FRCP 6. Failure to
14 file objections will result in a waiver of those objections for purposes of appeal. *Thomas v. Arn*,
15 474 U.S. 140 (1985). Accommodating the above time limit, the Clerk shall set this matter for
16 consideration on **January 12, 2018**, as noted in the caption.

17 Dated this 22nd day of December, 2017.

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20 Theresa L. Fricke
21 United States Magistrate Judge
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